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No. 91-263

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FOOD GIANT, INC.,
Petitioner,

v.

WILLIAM C. PORTER,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

ARGUMENT

I. THERE IS A CLEAR AND DIRECT CONFLICT AMONG THE CIRCUIT COURTS AS TO THE MEANING OF THE EXCEPTION TO ERISA'S BROAD PREEMPTION OF STATE LAW.

Respondent first concedes that "there are conflicts in the case law concerning the interpretation of the 'act or omission' exception to ERISA preemption." Resp. Br. at 4.[1] He later asserts that the conflict "is neither clear nor

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[1] Throughout this Reply, "Pet." will refer to the Petition for a Writ of Certiorari, and "Resp. Br." will refer to the Respondent's Brief in Opposition.

direct," Resp. Br. at 6, but eventually acknowledges an "arguabl[e]" conflict between "two lines of cases" that he then attempts to reconcile. Resp. Br. at 10. With eight federal courts of appeals and four state courts having considered the matter, the conflict among the decisions pointed out by Petitioner and acknowledged even by Respondent is far from merely "arguable" and cannot be reconciled by Respondent's fact-based distinctions.

At least seven of the courts that have ruled on the meaning of the exception to ERISA preemption in 29 U.S.C. § 1144(b)(1) of ERISA, including the Georgia Court of Appeals in this case, Pet. at 3a, themselves have stated that a substantial conflict exists among their decisions.[2] As the Fourth Circuit has said:

> [T]wo competing views have evolved. The Third Circuit regards the trustees' act in denying a pension application as an act or omission which is subject to ERISA . . . . By contrast, the First and Ninth Circuits have held that if the trustees' denial is the "inevitable result of unequivocal pre-effective date interpretations" of the plan, then the denial is not reviewable.

Rodriguez v. *MEBA Pension Trust*, 872 F.2d at 72 (citations omitted). The fact that Petitioner and Respondent cannot even agree on how to characterize the nature and extent of the conflict underscores rather than minimizes the need for a resolution by this Court.

The majority of the circuits that have considered the meaning of the exception to ERISA preemption, repre-

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[2] *See Rodriguez* v. *MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989); *Tanzillo* v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230, 1234 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. 1981); *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS 924, *5-*10 (13th Dist. Ct. App. April 11, 1991); *Porter* v. *Food Giant, Inc.*, 198 Ga. App. 736, 402 S.E.2d 766 (1991); *Wayte* v. *Rollins Int'l Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59, 66-67 (1985).

sented by the Third, Fourth, Fifth, Seventh and Eighth Circuits, have adopted a bright line rule that favors federal preemption of ERISA and ensures uniform, consistent application of the federal regulatory scheme, as Congress intended, in lieu of an uncertain fact-based *ad hoc* approach.[3] Thus, the majority approach is not characterized exclusively by the Fifth Circuit's decision in *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981), as Respondent erroneously asserts throughout his brief. Resp. Br. at 4, 5, 6, 7, 8, 9, 13.[4]

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[3] *See Tanzillo* v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Rodriguez* v. *MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989); *Degan* v. *Ford Motor Co.*, 869 F.2d 889, 894 (5th Cir. 1989); *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981); *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Winer* v. *Edison Bros. Stores*, 593 F.2d 307 (8th Cir. 1979).

[4] Although other circuits in the majority do not follow the Fifth Circuit's analysis in *Woodfork* precisely, they all adopt an interpretation of 29 U.S.C. § 1144(b)(1) that is consistent with ERISA's policies and purposes favoring federal preemption and a rule that ensures consistent, predictable application of ERISA's uniform regulatory scheme.

Contrary to Respondent's contentions, the Seventh Circuit's decision in *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983), is entirely consistent with the majority approach. *See* Resp. Br. at 7-8. There were two classes of claimants in *Colgate*. The first group sought to challenge the sufficiency of certain pre-ERISA waivers and their acceptance of payments in lieu of pension benefits. Their post-ERISA "discovery" of these waivers and the issue of the validity of these waivers and payments had nothing to do with ERISA and was not a claim under ERISA. Their ineligibility for benefits was specifically and finally determined prior to ERISA's enactment. The claims of the second group, reliant in part on pre-ERISA breaks in service, however, were held to have been preempted by ERISA because the plan administrator determined, after ERISA's enactment, that the claimants were ineligible for benefits under ERISA and the applicable plan provisions regarding breaks in service. The relevant "act" was the plan administrator's determination. Thus, *Colgate* adopted the bright line rule of the majority of circuits.

Respondent's attempt to recharacterize the various conflicting decisions fails to detract from the central question, that is, the meaning and proper interpretation of the exception to federal ERISA preemption found in 29 U.S.C. § 1144(b)(1). Regardless of how characterized, the crux of the issue is whether Congress intended that the denial of pension benefits years after the effective date of ERISA should be governed by ERISA or, because some of the acts or omissions leading to that denial may have occurred before ERISA was enacted, by the state law ERISA was intended to preempt.[5]

II. THE MULTIPLICITY OF CONFLICTS THAT ARE EXACERBATED BY THE GEORGIA COURT OF APPEALS' DECISION AND THE IMPORTANCE OF THE QUESTIONS RELATING TO FEDERAL PREEMPTION MAKE THIS CASE RIPE FOR REVIEW.

Compounding the existing conflict among the federal circuit courts of appeals on this important question of federal substantive law is the growing number of inconsistent state court precedents that mirror the federal conflict.[6] These mounting conflicts are "fundamentally at odds with the goal of uniformity that Congress sought to implement" by enacting ERISA. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478, 484 (1990). Now, because of

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[5] Respondent erroneously contends that this case "does not focus on general plan provisions." Resp. Br. at 11. But Respondent's own complaint alleged that he was entitled to pension benefits pursuant to the general plan provisions apart from his claim for damages based on an alleged breach of contract arising from that very same denial of pension benefits under the plan. Porter's Amended And Recast Complaint at 3-5, 7-8; Resp. Br. at 3. Respondent Porter's Amended And Recast Complaint was filed in the Georgia State Court of DeKalb County and was a part of the record before the courts below.

[6] *See Wayte* v. *Rollins Int'l, Inc.*, 169 Cal. App.3d 1, 215 Cal. Rptr. 59 (1985); *Grich* v. *Wood & Hyde Leather Co.*, 74 A.D.2d 183, 427 N.Y.S. 2d 96 (3d Dept. 1980); *Porter* v. *Food Giant, Inc.*, 198 Ga. App. 736, 402 S.E.2d 766 (1991); *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS 924 (13th Dist. Ct. App. April 11, 1991).

the failure of the Georgia Court of Appeals to follow the precedent binding on the federal courts in Georgia, there are inconsistent precedents in the federal and state courts in Georgia. Thus, in a single state contrary rules of decision further undermine the uniform regulatory scheme embodied in ERISA and leave employers with increased uncertainty as to their obligations regarding pension benefits.[7]

Respondent's argument that there is no conflict among the Georgia state and federal courts because the Eleventh Circuit has not rendered its own opinion on the question of ERISA preemption is a serious misreading of Eleventh Circuit precedent. *See* Resp. Br. at 4, 13. In *Bonner* v. *City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit expressly held:

> [T]he decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit . . . .

Id. at 1207. By its decision in *Bonner*, the Eleventh Circuit adopted the Fifth Circuit's construction of the ERISA preemption statute, along with all other Fifth Circuit precedent as of September 30, 1981, and that construction is binding. Therefore, because the Georgia Court of

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[7] Respondent argues that this case is unimportant because the significance of the "act or omission" clause will decline as time passes. Resp. Br. at 5, 11-12. But over the next twenty years, millions of workers who were participating in pension plans for a significant period of time prior to the effective date of ERISA will be applying for benefits. The pension entitlements of these beneficiaries will undoubtedly be affected by a wide variety of pre-ERISA acts or omissions. The confusion in the courts therefore will continue to have a significant impact for many years to come. *See* Pet. at 15 n.14.

This Court has recognized that questions involving federal preemption of state laws raise significant concerns appropriate for Supreme Court review. *See, e.g., Cipollone* v. *Liggett Group, Inc.*, No. 90-1038.

Appeals failed to follow the Fifth Circuit's decision in *Woodfork* v. *Marine Cooks & Stewards Union*, the state courts of Georgia are now bound by one precedent and the federal courts in Georgia by another.[8]

III. THE STANDARD ADOPTED BY THE GEORGIA COURT OF APPEALS UNDERMINES CONGRESSIONAL INTENT TO ENACT A UNIFORM BODY OF BENEFIT LAW UNDER ERISA TO BE APPLIED AS SOON AS PRACTICABLE.

The fact-based, *ad hoc* approach of the Georgia Court of Appeals and of the First, Second and Ninth Circuits leads to the anomalous result that a post-ERISA "cause of action" based upon a post-ERISA denial of pension benefits may still be governed by state law and provide state law remedies simply because some of the "acts or omissions" relating to the claim occurred prior to ERISA's effective date. Congress intended that ERISA preemption be construed "in its broadest sense,"[9] however, requiring that where a cause of action arises from a denial of benefits by a plan administrator after ERISA's effective date, that denial must be considered the only truly critical act, making the application of ERISA readily apparent.

The courts that have adopted this bright line approach have concluded:

> While the determination of a claim upon the Fund may require the Fund trustees to consider events that have taken place before ERISA's enactment, the act

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[8] Respondent's suggestion, Resp. Br. at 13, that *Woodfork*'s holding "could be regarded as *dicta*," and for that reason not binding, is groundless. The question raised in *Woodfork* was whether certain state claims founded in part on occurrences prior to the enactment of ERISA were preempted by ERISA. The meaning of section 1144(b)(1) was directly in dispute and a necessary part of the court's final determination.

[9] 120 Cong. Rec. 29,933 (daily ed. August 22, 1974) (remarks of Sen. Williams).

> of granting or denying a pension nevertheless involves a contemporaneous construction of the plan's provisions—an "act or omission" to which ERISA[] . . . appl[ies]. . . ."

Tanzillo v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d at 144; *see* cases cited in n.3 *supra*. This bright line approach construes the statutory exception to preemption as narrowly as possible, thus assuring full federal preemption of the field as soon as practicable, as Congress clearly intended. *See Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981); *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. at 482-84, quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46-47 (1987); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98-100 (1983).

Focusing on the timing of the denial of benefits provides certainty to employers, plan administrators and claimants and relieves plan participants from having to be ever-vigilant regarding benefits that may be lost because of the timing of certain "critical acts." It also prevents possibly arbitrary or discriminatory determinations regarding benefits (which ERISA was intended to eliminate) under the guise of "secret understandings" and the like.[10] This simple, more predictable rule of decision furthers congressional intent to "minimize the . . . burdens of complying with conflicting directives among States or between States and the Federal Government" regarding pension benefits. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. at 484.

The Fourth Circuit summarized the majority view and its advantages in *Rodriguez*:

> While a claim determination may require the plan's trustees to consider pre-ERISA acts, the act of de-

[10] Although it is not directly relevant at this stage, Petitioner does dispute, contrary to Respondent's assertion, Resp. Br. at 2, that Max Alterman had full authority to make a commitment to Respondent, and has filed a crossclaim against Alterman in the court below.

> nying a pension post-ERISA will invariably involve a "contemporaneous construction of the plan's provisions . . . to which ERISA's fiduciary standards apply." Such a view fosters the congressional intent "to extend the protections of ERISA . . . as soon as practicable," so as to "provid[e] . . . ready access to the Federal courts." 29 U.S.C. § 1001(b). It also promotes Congress' intention that exceptions to ERISA's preemption provisions be narrowly construed. Further, [this] approach has the advantage of certainty. Courts need only look to the date of the trustees' determination to decide whether ERISA applies. Finally, equitable considerations support this standard. Plan participants cannot be expected to inquire about benefits until retirement. Because plan trustees will not act on a participant's claim until it is made, their act of denying a claim will inevitably involve a post-ERISA interpretation of the plan.

Rodriguez v. *MEBA Pension Trust*, 872 F.2d at 72-73 (citations omitted).

By permitting application of state law to a significant number of cases nearly twenty years after ERISA's enactment, the approach adopted by the Georgia Court of Appeals and three of the federal circuit courts of appeals critically undermines Congress' policy choices to include certain remedies and to exclude others. *See Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. at 485. The minority's fact-based, *ad hoc* approach, which requires the courts to ascertain which "critical acts" "inexorably" led to a given result, yields inconsistent and uncertain application of the law relating to pension plans. It is "fundamentally at odds with the goal of uniformity that Congress sought to implement" through ERISA. *Id.* at 484.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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